

The Honorable Edward F. Shea

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RICHARD LOID and GINGER
LOID, a marital community.

Plaintiff,

vs.

COMPUTER SCIENCES
CORPORATION, a Nevada
Corporation, HEIDI JARRETT and
JUSTINE JARRETT

Defendants.

No. CV-12-5144-EFS

PLAINTIFFS' REPLY
MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE OF COURT
TO AMEND COMPLAINT

COME NOW the plaintiffs, Richard and Ginger Loid, by and through
their attorneys of record, and reply to defendants', Computer Science

1 Corporation ("CSC"), Heidi Jarrett, and Justine Jarrett, opposition to motion
2
3 for leave to amend complaint.
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5 INTRODUCTION

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7 Plaintiff Richard Loid brought suit against defendants in the Superior
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9 Court of Washington, Benton County, alleging the tort of wrongful discharge
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11 and tortious interference with a business expectancy. Defendants, in an
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13 attempt to forum shop for their corporate client, removed the matter to this
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15 court (ECF No. 12). Defendants did so despite a pending hearing in the state
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17 court, arguing that defendants, Heidi and Justine Jarrett ("Jarretts") were
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19 fraudulently joined. (ECF No. 1,4). Defendants then filed a Rule 12(b)(6)
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21 motion to dismiss the Jarretts.
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25 In response, plaintiffs filed this motion for leave of court to amend their
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27 complaint to add claims of outrage and defamation. Defendants oppose the
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29 motion claiming the claims are "futile" and additionally ask this court to strike
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31 the motion of Brian Davis. Defendants take these positions in an attempt to
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33 forum shop for their corporate client. They do so while ignoring the likely
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1 culpability of two individuals who caused tremendous turmoil to Richard and
2
3 Ginger Loid's financial, emotional and marital well-being.
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5 6 ARGUMENT

7
8 **I. It can be proven that the Jarretts' conduct in working to**
9 **terminate Loid's employment was both outrageous and defamatory,**
10 **therefore leave should be granted.**

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12 A district court "shall grant leave to amend freely 'when justice so
13 requires.' *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (*quoting* Fed. R.
14 Civ. P. 15(a)). In addition, "this policy is to be applied with extreme
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16 liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079
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18 (9th Cir. 1990); *see also Griggs v. Pace Am. Group, Inc.* 170 F. 3d 877, 880
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20 (9th Cir. 1999) (noting that inferences should be drawn "in favor of granting
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22 the motion"). A motion for leave to amend may be denied if it appears to be
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24 futile or legally insufficient. However, a proposed amendment is futile "only if
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26 no set of facts can be proved under the amendment to the pleadings that would
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28 constitute a valid and sufficient claim or defense." *Miller v. Rykoff-Sexton, Inc.*
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30 845 F. 2d 209, 214 (internal citations omitted). The proper test to be applied
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1 when determining the legal sufficiency of a proposed amendment is identical
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3 to the one used when considering the sufficiency of a pleading challenged
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5 under FRCP 12(b)(6). *Sheperd v. American Honda Motor Co. Inc.*, 822
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7 F.Supp. 625 (N.D. Cal. 1993). “A complaint should not be dismissed under
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9 Rule 12(b)(6) unless it appears *beyond a doubt* that the plaintiff can prove no
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11 set of facts in support of his claim which would entitle him to relief.”
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13 *Balistreri v. Pacifica Police Dept.* 901 F.2d 696, 699 (9th Cir. 1992)(emphasis
14
15 added)
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17
18 **A. The alleged facts can be proven to show that the Jarretts’**
19 **conduct constituted defamation.**
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21 To state a claim of defamation in Washington State, one must prove (1)
22
23 a false and defamatory communication; (2) lack of privilege; (3) fault; and (4)
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25 damage. *Duc Tan v. Le*, 161 Wash. App. 340, 254 P.3d 904 (Div. II 2011).
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27 The plaintiffs allege the following facts that if proven, would entitle plaintiff
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29 to relief.
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- 32 • Plaintiff, Richard Loid found that Justine Jarrett, daughter of HR
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34 director Heidi Jarrett, “grew complacent in the workplace” and
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1 suggested to his direct supervisor that her position should be
2
3 terminated. Heidi Jarrett was informed of this suggestion and Loid
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5 was immediately placed on suspension. (ECF No. 16 Ex. A. ¶¶ III,
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7 IV, X).
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9

- 10 • Mr. Loid was investigated for sexual harassment and was later
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12 terminated. (ECF No. 16 Ex. A. ¶ XI, XII). The investigation
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14 “focused on . . . Justine Jarrett”, who “communicated” to her mother
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16 and others that Richard Loid had “allegedly given” her romantic
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18 letters as a means to “bolster her false claim of sexual harassment.”
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20 (ECF. NO. 16 Ex. A. ¶ XII).
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- 22 • This communication included “false facts” as “the letters were
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24 written by Richard Loid and *intended for his wife*, but were taken
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26 off his desk by Justine Jarrett.” Id. (emphasis added).
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28
- 29 • Heidi Jarrett “participated in the investigation and termination of
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31 Richard Loid’s employment.” Heidi Jarrett “communicated the false
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33 facts regarding the romantic letters to others with malice. Justine
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1 and Heidi Jarrett did so to effectuate Richard Loid's termination so
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3 that Justine would not lose her position." (ECF NO. 16 Ex. A. ¶
4
5 XIII).

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7 The above alleged facts, if proven, clearly state a claim for defamation
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9 in Washington State. As such, plaintiffs should be permitted to add the claim
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11 of defamation because asserting such a claim would not be futile.
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14 Defendants argue that there are no facts alleged that Heidi Jarrett or
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16 Justine made any statement. To support this position, they cite absolutely no
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18 authority. In Washington, a provably false statement is when "it falsely
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20 describes the act, condition or event that comprises its subject matter."
21
22 *Schmalenberg v. Tacoma News, Inc.*, 87 Wash.App. 579, 590-91, 943 P.2d
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24 350 (1997). Both Heidi Jarrett and Justine Jarrett communicated the false
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26 facts regarding the romantic letters. The example of the false facts, as outlined
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28 in the complaint, is that the letters "were written by Richard Loid and . . .
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30 given to Justine Jarrett." (ECF No. 16 Ex. A. ¶ XII). This is provably false as
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32 the letters were written by Richard Loid and "intended for his wife." *Id.* As
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1 such, it is clear by the alleged facts that that statements of false facts
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3 surrounding the romantic letters were made by both Justine and Heidi Jarrett.
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5 Defendant next takes the position that there exists a privilege regarding
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7 the statements made by the Jarretts. However, defendants completely ignore
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9 the case law explaining how a privilege can be waived in Washington State.
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11 While a privilege may exist regarding the communications, any privilege
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13 asserted is likely lost as it was abused due to the Jarretts' knowledge of the
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15 falsity of their statements and reckless disregard as to the falsity of the
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17 statements. Stated otherwise, they acted with actual malice as alleged in the
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19 pleadings. "Justine and Heidi Jarrett did so to effectuate Richard Loid's
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21 termination so that Justine would not lose her position." (ECF No.16 Ex. A ¶
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23 XIII). A "showing of actual malice will defeat a conditional or qualified
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25 privilege." *Herron v. Tribune Pub. Co. Inc.*, 108 Wash.2d 162, 183, 736 P.2d
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27 249 (1987).
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30 The facts alleged in the complaint support a claim of defamation. Any
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32 privilege asserted by defendants has been waived because they acted with
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malice when making false statements about the plaintiff, as alleged in the complaint. The defamation claim is not futile and leave to amend should be granted.

B. The alleged facts can be proven to show that the Jarretts' conduct was outrageous.

To recover for the tort of outrage, the plaintiff must prove (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress. *Corey v. Pierce County*, 154 Wash.App. 752, 225 P.3d 367 (Div I 2010). The facts, as alleged, indicate the following:

- Immediately after Richard Loid suggested the termination of Justine Jarretts position, he was placed on leave and investigated for sexual harassment that focused on Justine Jarrett. (ECF. No. 16 Ex. A ¶¶ X, XII).
- Justine Jarrett communicated false facts regarding romantic letters to her mother, HR Director Heidi Jarrett in order to bolster the false claim of sexual harassment. (ECF No. 16 Ex. A. ¶ XII).

- 1 • Heidi Jarrett participated in the investigation and termination of
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3 Richard Loid and communicated the false facts regarding the
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5 romantic letters to effectuate Loid's termination so that Justine
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7 would not lose her position (ECF No. 16. Ex. A ¶ XIII).
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- 10 • During the investigation, Heidi Jarrett intimidated employees whom
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12 she interviewed as Brian McAfee believed that "mother and daughter
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14 discussed things and influenced one another and that Heidi could
15
16 retaliate against him." In fact, some individuals who were
17
18 interviewed "were afraid to say anything during their interviews"
19
20 with Ms. Jarrett "because Justine was Heidi's daughter." (ECF No.
21
22 16 Ex. A. XIV).
23
- 24 • Richard Loid has experienced emotional distress because of Heidi
25
26 and Justine Jarretts' conduct (ECF No. 16 Ex. A. ¶ XVI).
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29 The question of whether certain conduct is sufficiently outrageous is
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31 ordinarily for the jury, but it is initially for the court to determine if reasonable
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33 minds could differ on whether their conduct was sufficiently extreme to result
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1 in liability. *Seaman v. Karr*, 114 Wash.App. 665 (2002). In addressing this
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3 motion, this court may be guided by the facts in *Corey v. Pierce County*, 154
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5 Wash.App. 752 (2010). In *Corey*, the plaintiff, a prosecuting attorney, was
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7 terminated from employment by being forced to resign. She was
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9 subsequently investigated for mishandling of public funds despite the fact that
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11 it was known that there was no wrongdoing in this regard. This information
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13 was disseminated to third parties causing emotional distress on the plaintiff.
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15 The court permitted the outrage claim to go to the jury and instructed the jury
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17 that the outrage claim “can be considered for all . . . actions by the
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19 Defendants.” *Id.* at 763.
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21

22 Similar to this case, the defendants in *Corey* relied on *Dicomes v. The*
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24 *State of Washington*, 782 P.2d 1002 (Wash. 1989) to stand for the proposition
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26 that, as a matter of law, an allegation that a defendant employer had created an
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28 intentionally false report for the sole purpose of embarrassing and humiliating
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30 the plaintiff was not sufficient to make out a prima facie case of outrage. The
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32 court in *Corey* correctly pointed out that the defendants were not accurately
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1 portraying the statements in *Dicomes*. Instead, the claim in *Dicomes* was
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3 dismissed because “Dicomes did not establish sufficiently outrageous behavior
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5 to warrant liability.” *Corey* at 764. The plaintiff in *Corey*, however, did
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7 present sufficient evidence to allow the claim to go to the jury. Specifically,
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9 the plaintiff showed that the defendant essentially publically accused her of
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11 criminal behavior despite knowledge that an internal investigation revealed
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13 little of substance to such accusation. *Id.*

14
15
16 In this case, similar to *Corey*, there are sufficient facts alleged to support
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18 a claim of outrage. Richard Loid was investigated by HR Director Heidi
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20 Jarrett for sexual harassing her daughter, Justine Jarrett. This investigation
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22 took place immediately after Loid suggested terminating Justine’s position.
23
24 The investigation was supported by untrue statements and proof provided by
25
26 Justine and resulted in Loids termination and significant emotional damage.
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28 (ECF No. 16 Ex. A ¶¶ X, XII, XIII, XVI). This amounts to extreme and
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30 outrageous conduct that resulted in severe emotional distress. At the very
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32 least, reasonable minds could differ as to whether the conduct was outrageous
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1 therefore the claim is not futile.

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3 Defendant also relies on unpublished case law to support their
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5 contention that plaintiff cannot state a claim for the tort of outrage. Defendant
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7 fails to provide this honorable court with photocopies of the unpublished case
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9 law in defiance to LR 7.1(g)(3) and this court should not consider the legal
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11 precedent for which they are asserted. However, for the purpose of
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13 completeness, plaintiff will address each.
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16 First, defendant uses unpublished case law to support the notion that
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18 privileged communications cannot be the basis for an outrage claim but again
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20 fails to address waiver of privileged communication under Washington
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22 jurisprudence as discussed above. Second, defendants use unpublished case
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24 law to support the notion that the plaintiffs must be present during the
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26 purported activities to support the tort of outrage. While Washington courts
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28 apply a “presence requirement” it is only applicable when the outrage is
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30 directed at a third party. *Lund v. Caple*, 100 Wash.2d 739 (1984) (holding the
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32 presence requirement “is a crucial element of a claim for outrage when the
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1 conduct is directed at a third person).

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3 It cannot be held that, beyond a doubt, the plaintiff is unable to prove
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5 these facts to support a claim of outrage. To the contrary, plaintiff can, and
6
7 will, prove the facts to support the claim of outrage and therefore, the stated
8
9 claim is not futile and leave should be granted to amend the complaint.
10

11
12 **C. This court should not strike the declaration of Brian Davis**
13 **because it substantially comports to the criteria set forth in 28**
14 **U.S.C § 1746.**
15

16 Defendants request this court to strike the declaration of Brian Davis
17
18 without any supportive authority what-so-ever. In doing so, they misstate the
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20 law asserting that 28 U.S.C. § 1746 contain strict requirements to be an
21
22 admissible statement. Little research will reveal that this is simply not true.
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24 In *Powell v. Profile Design LLC* the defendant objected to plaintiff's
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26 declaration because it did not comply with 28 U.S.C. § 1746. Defendant
27
28 argued the declaration was inadmissible because it was signed overseas and
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30 did not "state, declare, verify, or certify under the penalty of perjury under the
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32 laws of the United States that the instrument was true and correct." *Powell v.*
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1 *Profile Design LLC*, 838 F.Supp. 2d 535 (S.D. Tex., 2012). The court rejected
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3 defendant's argument because the declaration stated, "Declaration of Jon
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5 Chaing Under Penalty of Pejury" and declared "under penalty of perjury that
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7 the foregoing is true and correct." *Id.* The court went on and stated "Indeed,
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9 while 28 U.S.C. § 1746 suggests the particular language 'I declare (or certify,
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11 verify, or state) under penalty of perjury under the laws of the United States of
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13 America that the foregoing is true and correct,' the provision states only that
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15 the declaration need be 'substantially' in that form." *Id.*
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18 Similar to the declaration in *Powell*, the declaration of Brian Davis
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20 submitted to support this motion, states, "I DECLARE THE FOREGOING
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22 UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE
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24 UNTIED STATES OF AMERICA" and is immediately after signed by the
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26 declarant. (ECF No. 17-1). As such, it substantially comports to the
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28 requirements of 28 U.S.C. § 1746 just as the court held in *Powell*.
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31 Furthermore, defendant states, without any authority, (case law or
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33 statute), that the declaration is not based on personal knowledge. They do so
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1 despite admitting that the first paragraph declares that the declarant had
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3 personally “garnered additional information . . . that supports claims for
4
5 defamation and outrage.” The declaration continues with examples of such
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7 information personally garnered. (ECF No. 17-1). Because defendant has
8
9 opened the door to such an argument, plaintiff hereby submits a supplemental
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11 declaration with additional information to satisfy their high standards
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13 regarding 28 U.S.C. §1746 asserted in their opposition memorandum. (See
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15 Declaration of Brain Davis with attachment).
16

17 18 CONCLUSION

19
20 For the reasons stated herein, this honorable court should grant plaintiff
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22 leave to amend their complaint asserting the claim of defamation and outrage
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24 against defendants Heidi and Justine Jarrett.
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1 Respectfully submitted this 22st day of December, 2012.
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5 LEAVY, SCHULTZ, DAVIS & FEARING, P.S.
6
7

8 By: s\ Brian Davis
9

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of December, 2012, I electronically filed the foregoing with the Clerk of the Court using CM/ECF System which will send notification of such filing to the following Attorneys for Defendants:

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